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Supreme Court of the United States

October Term, 1956

No. 387

CONRAD BANTEL ET. AL., *Petitioners*

v.

HERBERT BROWNELL, JR., ET. AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Summary Statement of the Case	2
Reasons for Granting the Writ	4
Appendix	1 A

Table of Cases

	PAGE
Brownell v. Chase, 1954 N. Y. Law Journal, May 28, p. 7; Appellate Division and Court of Appeals without opinion	8
Brownell v. Edmunds, (CCA-9), 209 F. (2) 349	9
Clark v. Uebersee, 332 U.S. 480, 92 L. ed. 80, 68 S. Ct. 174	9
Delaware v. Metropolitan Trust Co., (CC NY) 146 Fed. 600	8
Green v. Green, 90 U.S. 486, 23 Wall. 486, 23 L. Ed. 75	8
Markham v. Cabell, 326 U.S. 404, 90 L. Ed. 165, 66 S. Ct. 193	7
Orvis v. Brownell, 345 U.S. 183, 97 L. Ed. 939, 73 S. Ct. 596	9
State v. Bankers Trust, 105 Vt. 220, 164 A. 377	8, 9
The Matter of Buechner, 226 N.Y. 440, 123 N.E. 741	8
Washington v. American Security & Trust Co., 38 App. D.C. 421, error and leave to appeal den., 224 U.S. 486, 56 L. Ed. 854, 32 S. Ct. 554	9
Waters v. Manufacturers Trust Co., (CCA Mich.), 143 F. (2) 383	8

Miscellaneous Citations

Executive Order No. 8389, as amended, 12 U.S.C.A. Sec. 95(a), p. 456 5

Executive Order No. 9095, as amended, 50 U.S.C.A. App., Sec. 6, p. 46 5

General License No. 94, as amended, 12 F.R. 1457..... 4

Regulations, Office of Alien Property, Amendments at 12 F.R. 1544 4

Scott, Law of Trusts (1939) 9

Supreme Court of the United States

October Term, 1956

No. .....

CONRAD BANTEL, HELENE LIEB, WILHELM NAGEL and BERTA SPENGLER

v.

HERBERT BROWNELL, JR., Attorney General of the United States, and IVY BAKER PRIEST, Treasurer of the United States

PETITION FOR A WRIT OF CERTIORARI

To the United States District Court of Appeals for the District of Columbia Circuit

Counsel for plaintiffs and appellants prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, dated June 7, 1956.

OPINIONS BELOW

The United States District Court for the District of Columbia (B. S. Matthews) dismissed the complaint upon motion without opinion (R. 28). The affirming decision of the United States Court of Appeals for the District of Columbia Circuit (unreported as yet) is printed at A. 1-2.

JURISDICTION

Jurisdiction of the United States Supreme Court is based on 28 U.S.C.A. 1254.

QUESTIONS PRESENTED

(1) Had the Office of Alien Property power and authority to seize property in 1951, wherein German nationals acquired a vested interest after January 1, 1947, the date as of which such newly acquired property was licensed and deemed to be property wherein no designated national had an interest?

(2) Whether or not such power and authority existed, have Germans so licensed as to property wherein they acquired a vested interest *after* January 1, 1947, the right to sue pursuant to Section 9(a) of the Trading with the Enemy Act?

(3) If the American grantor of a revocable trust expressly revokes such trust in 1947 and re-establishes it anew with different portions and conditions to the grantees, can the Office of Alien Property, in vesting the newly created interests, relate them back to the original and revoked interest, thereby, in effect, disregarding the revocation?

SUMMARY STATEMENT OF THE CASE

An American resident and citizen placed her property and estate under the management of a bank by the terms of an inter vivos trust, dated 1934. The trust instrument reserved all enjoyment and control of the property to the grantor during her life time and reserved for herself unlimited powers of amendment and revocation (R. 8-12). As usual, the instrument provided for distribution of the

estate upon grantor's death. The grantor freely exercised these powers by revocations and re-establishments of the testimentary disposition in 1943, 1946 and 1947. The earlier revocations evidenced the purpose to keep the estate out of the hands of alien enemies or the Office of Alien Property (R. 13, 17). The last revocation and re-establishment of April, 1947 enlarged the shares of some beneficiaries, reduced the shares of others, eliminated all legatees and, inter alia, no longer contained a proviso designed to defeat vesting in or payment to, enemy aliens and/or to the Office of Alien Property (R. 18-20). This revocation and re-establishment was made less than six weeks after an announcement by the interested Departments of the United States Government, according to which newly acquired assets of Germans would no longer be vested (R. 23-26). Simultaneously, amendments of rules and regulations had implemented the announcement (R. 20-22 and 12 Fed. Reg. 1544). The grantor acted in knowledge of, and reliance upon, these official acts (R. 5-6, paragraph 20).

On April 25, 1950, the grantor died. By Vesting Order, dated May 24, 1951 (R. 2-4), the Office of Alien Property vested appellants' interests.

Having duly filed notices of claim (R. 4(12)), petitioners filed suit for return of the vested property in the United States District Court for the District of Columbia that was dismissed upon respondents' motion in the nature of a demurrer, without opinion (R. 28). The United States Court of Appeals for the District of Columbia Circuit held upon appeal that petitioners had an interest in the property at all times since April 6, 1934, also, in effect, denying that the various actions taken by the Departments had any result whatever affecting the grantor or the petitioners (A. 1).

REASONS FOR GRANTING THE WRIT

1. On March 3, 1947, the Secretary of the Treasury amended General License No. 94,[1] so as to declare Germans to be regarded as if they were not designated nationals in regard to property acquired by them after December 31, 1946.[2] Simultaneously, the respondent Attorney General[3] promulgated amendments to Alien Property Regulations, consenting to the transfer of such property. On the same date, the four Departments[4] issued a press release, ending vesting of such property.[5] The question is whether, by virtue of all or either of these acts, Germans with property acquired *after* December 31, 1946, became licensed nationals as to such property.

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[1] 12 F.R. 1457. The general License, as amended, reads in part:
(a) . . . A general license is hereby granted licensing all blocked countries and nationals thereof . . . to be regarded as if such countries were not foreign countries designated in the order . . .
. . .
(e) . . . Paragraphs (a) and (b) of this section shall not apply with respect to any national of a country licensed hereby who is also a national of any excepted country, *Provided, however,* That for the purpose only of this license the following shall be deemed not to be nationals of an excepted country:
(1) Any individual residing in a country licensed hereby.
. . .
(g) . . . The effective date of this general license shall be December 7, 1945, except that it shall be . . . December 31, 1946, as to Germany . . .

[2] See General License No. 94, as amended, subsection (g).

[3] 12 F. R. 1544.

[4] The State Department, the Secretaries of the Treasury, War, and the Attorney General.

[5] Set forth in full in R 23-26.

The Court below held as follows:[6]

> "Appellants would have us ignore not only the relatively narrow purpose of General License No. 94. . . . ."

While it is open to conjecture, in how far there is to be a narrow purpose, the court below apparently believed that these actions referred to freezing but not to vesting.

The Secretary of the Treasury was acting pursuant to delegated power to define the term "national" as used in Sec. 5(b) of the Trading with the Enemy Act.[7] Pursuant to Executive Order No. 9095, as amended,[8] his definitions are conclusively presumed to be made after consultation with the other departments.[9] Moreover, the press release and the simultaneous amendment of the rules by the Office of Alien Property show, in fact, that joint action was contemplated and taken.

Thus, the holding that Germans who have acquired property after December 31, 1946, are not to be regarded as licensees construes the Act and the implementing Executive Orders contrary to their plain meaning. In view of

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[6] In footnote 2 of the decision, last paragraph.

[7] Executive Order No. 8389, as amended, 12 U.S.C.A. Sec. 95 (a), p. 456.

[8] 50 U.S.C.A. App., Sec. 6, p. 46(46).

[9] It says in Sec. 13:

"Any regulations, ruling, instructions, licenses, determinations or other actions issued, made or taken by any agency or person referred to in this Executive Order, purporting to be under the provisions of this Executive Order or any other proclamation, order or regulation, issued under section 3(a) or 5(b) of the Trading with the Enemy Act, as amended (sections 3(a) and 5(a) of this Appendix) shall be conclusively presumed to have been issued, made or taken after appropriate certification in any case in which a certification is required pursuant to the provisions of this Executive Order."

the fact that such holding gives the impression to the world that the Government of the United States does not act in conformity with its self-imposed pronouncements and regulations, and is sustained therein by our courts, it is submitted that the importance of the matter appears to be established, as is the fact that this Court should rule on the point, not having done so heretofore.

2. The fact that the decision below permits vesting of property by the Office of Alien Property, even though divestees were licensed in regard to such property, constitutes the second reason for granting the writ. The question raises both a constitutional point and a point in regard to the interpretation of Federal laws and Executive Orders of the President. It also raises the question of sanctioning a far departure of administrative agencies from their duties.

The two provisions of the Trading with the Enemy Act that authorize vesting are section 7(c) and section 5(b). Section 7(c) expressly exempts from vesting the property of enemies who hold a license. Section 5(b) authorizes the vesting of the property of designated nationals. Section 5(b) does not contain a proviso exempting licensed nationals, but it delegates power to the President to prescribe rules and regulations. The President, by Executive Order No. 8389, as amended,[10] has delegated this power to the Secretary of the Treasury. The Secretary of of the Treasury has been specifically authorized by Executive Order No. 9095, as amended, to make rules as to section 5(b), prescribing that such rules made by him shall be conclusively presumed to have been issued after appropriate consultation with the other Departments involved.[11]

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[10] See n. 7, supra.

[11] See n. 8, supra.

Under these circumstances, Germans holding property that they acquired after December 31, 1946, are not subject to vesting because they are not within the definition prescribed for section 5(b); nor are they subject to vesting under section 7(c), because they are licensed.

As the Court said in *Markham* v. *Cabell*[12] the Act and its amendments must be read together. Thus it is submitted that the exemption as to licensees contained in section 7(c) would apply even if the implementations to section 5(b) had not expressly exempted such persons. If, thus, the respondent Attorney General had no power to vest such property, then he violated the due process clause of the Constitution in exercising a power that was not delegated to him.

Thus, the decision below permits the taking of private property without compensation. While the protection afforded by the Constitution against confiscation does not benefit enemies, it is submitted that it does protect their property, once it is the subject of a license, duly issued. This, it is believed, is a question of substance .

Quite apart from the constitutional question that may not have to be reached by the Court, the question whether licensed property is subject to vesting, which was never decided by this, or, insofar as counsel has been able to determine, by any other court, is important and should be determined by this Court.

3. The decision below denies to the petitioners the right to sue under section 9(a) of the Trading with the Enemy Act, holding, in effect, that a licensed enemy has no right to sue thereunder.

If this decision would be allowed to stand, then section 9(a) of the Trading with the Enemy Act would be utterly illusory (Compare *Brownell* v. *Chase National*

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[12] 326 U.S. 404, 90 L. Ed. 165, 66 S. Ct. 193.

Bank,[13] writ granted, Case No. 24, October Term, 1956): there would be no recourse whatever.

The question gains in importance with the possibility, as demonstrated in the case at bar, that an American grantor has been induced to make dispositions by the actions of the Departments and can no longer fight back because he has died since.

4. The fourth reason for granting a writ is somewhat more involved. The court below came to the conclusion in the case at bar that, talking of the petitioners, "certainly they had an interest on December 31, 1946".

Indeed, the petitioners herein may have had interests on December 31, 1946. But those interests were *defeated* by the grantor's *revocation* of the revocable gift that the grantor pronounced in April, 1947. The interests that were vested in 1951 were *newly created* by the grantor in April, 1947, after revocation of the old interests. Moreover, they differed from the old interests in that they were *larger* and unconditional.

For the purpose of this particular reason for granting the writ, we assume that the court below was aware of, and did apply, the following well established rules of trust law:

(a) That there is no room for construction where the instrument is clear;[14]

(b) That where there is construction necessary, the intent of the grantor governs;[15]

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[13] **1954 N.Y. L. J. May 28, p. 7 (appellate decs. without opinion)**

[14] *Waters* v. *Manufacturers Trust Co.* (CCA Mich.), 143 F. (2) 383; *Delaware* v. *Metropolitan Trust Co.* (CC NY), 146 Fed. 600.

[15] *Green* v. *Green*, 90 U.S. 486, 23 Wall 486, 23 L. Ed. 75; (Cardozo): *The Matter of Buechner*, 226 N.Y. 440, 123 N.E. 741; (S. Ct. Vt.) *State* v. *Bankers Trust*, 105 Vt. 220, 164 A. 377; see

(c) That a new disposition over all the trust fund would effectuate a revocation of the entire trust even if the word "revocation" had not been used; [16]

(d) That a grantor may revoke and immediately create a new trust, designating the trustee of the old trust as trustee of the new, if he so desires.[17]

If so, then its statement that the petitioners held an interest on December 31, 1946—although such interest had been destroyed by the revocation on the part of the grantor—can only be understood to mean that the court wanted to permit seizure under the Trading with the Enemy Act, even if the right of the beneficiaries was not a vested right.

That, however, conflicts with decisions of this Court. In *Orvis* v. *Brownell* [18] Mr. Justice Douglas spoke of an

> "interest, right or title" in property such as will support a claim against the Custodian under § 9(a) of the Act.

In *Clark* v. *Uebersee*,[19] Mr. Justice Douglas speaks of "property interests" which had either an open or concealed enemy taint.

There is also direct conflict with a decision of the Circuit Court of Appeals for the Ninth Circuit,[20] wherein Chief Judge Parker said:

Washington v. *American Security & Trust*, 38 App. D.C. 421; error and leave to appeal den. 224 U.S. 486, 56 L.Ed. 854, 32 S. Ct. 554.

[16] *State* v. *Bankers Trust*, n. 15, supra.

[17] Scott, Law of Trusts (1939), Sec. 331.1.

[18] 345 U.S. 183, 97 L. Ed. 939, 73 S. Ct. 596.

[19] 332 U.S. 480, 92 L. Ed. 80, 68 S. Ct. 174.

[20] *Brownell* v. *Edmunds* (CCA 9), 209 F. (2) 349.

"This being true, there was no vesting of any estate in an alien enemy which would render it subject to seizure under the statute here relied on."

5. If, however, the decision of the court below is meant to be a digression from either one of the four points of trust law mentioned hereinabove under 4(a) through (d) —the reasoning of the court fails to appear from the decision—then it is submitted that such digression constitutes such a departure from well established law in the field of trusts that the question should be settled by this Court in the interest of law and justice.

WHEREFORE, the petitioners submit that a writ of certiorari should be granted to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

Before EDGERTON, Chief Judge, and PRETTYMAN and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* This is a suit arising under the Trading With the Enemy Act, 50 U.S.C.App. § 1 *et seq.* (1952). The complaint seeks return of vested property under Section 9(a) of that Act, or in the alternative a mandatory injunction and declaratory judgment.[1] The District Court dismissed the complaint, and this appeal followed.

Plaintiffs-appellants are and always have been citizens and residents of Germany, and hence as former enemies are prima facie barred from relief under Section 9(a) by the express language of that section. They argue, however, that General License No. 94, as amended on March 4, 1947 (12 FED. REG. 1457), made them "licensees" and removed them from the "enemy" category under Section 9(a). This, they say, had the double effect of preventing the Attorney General from thereafter vesting their property, and of permitting them to sue under Section 9(a). We cannot agree. General License No. 94, as amended, certainly does not so provide in terms, and nothing in its background or necessary effect indicates

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[1] Certain property was placed with a Colorado bank in trust for appellants and others on April 6, 1934, by revocable deed of that date, subject to a life estate in the settlor. By amendment dated April 14, 1947, the instrument was modified so as to increase appellants' share, and to remove a condition (added by earlier amendment) that if at the settlor's death relations between the United States and Germany precluded direct payment to appellants, the trust should continue until direct payment became possible. The settlor died in 1950, and the Government vested appellants' interest on May 24, 1951. Appellants had an interest in the trust property at all times since April 6, 1934: certainly they had an interest on December 31, 1946. Cf. H. J. Res. 289, 65 STAT. 451 (1951).

that it should be given the construction appellants urge.[2]

The relief sought as an alternative to Section 9(a) relief cannot be granted: that section "provides the only judicial remedy for reclaiming vested property . . . ." *Hawley* v. *Brownell*, 94 U.S.App.D.C. 104, 215 F.2d 36 (1954). The judgment of the District Court, dismissing the complaint, must therefore be

Affirmed.

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[2] General License No. 94, as amended on March 4, 1947, provides in pertinent part:

"(a) *Blocked countries generally licensed subject to certain conditions.* A general license is hereby granted licensing all blocked countries and nationals thereof (excepting the following countries and nationals thereof: Portugal, Spain, Sweden and Tangier) to be regarded as if such countries were not foreign countries designated in the order, *Provided*, That

"(1) Any property in which on the effective date hereof any of the following had an interest: (i) any blocked country (including countries licensed hereby) or person therein; or (ii) any other partnership, association, corporation, or other organization, which was a national of a blocked country (including countries licensed hereby) by reason of the interest of any such country or person therein; or

"(2) Any income from such property accruing on or after the effective date hereof shall continue to be regarded as property in which a blocked country or national thereof has an interest and no payment, transfer, or withdrawal or other dealing with respect to such property shall be affected under, or be deemed to be authorized by, this paragraph."

Appellants would have us ignore not only the relatively narrow purpose of General License No. 94 but also the proviso just quoted. As to Germany and its nationals, the effective date of General License No. 94, as amended, was December 31, 1946.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Executive Orders and Regulations Involved	2
Statement	3
Argument	5
Conclusion	7
Appendix	8–13

CITATIONS

Case:	
National Savings & Trust Co. v. *Brownell*, 95 U. S. App. D. C. 370, 222 F. 2d 395, certiorari denied, 349 U. S. 955	6
Statutes and Executive Orders:	
Trading With the Enemy Act (40 Stat. 411, as amended, 50 U. S. C. App. § 1, et seq.):	
Section 2	4
Section 9 (a)	2, 5
Joint Resolution of October 19, 1951 (65 Stat. 451)	6
Executive Order No. 8389, as amended, 3 C. F. R. 1943 Cum. Supp. 948	2, 4, 6, 8
Executive Order No. 9193, 3 C. F. R. 1943 Cum. Supp. 1121 and 1174	6, 10
Miscellaneous:	
1 Scott, *Trusts* (2d ed., 1956) § 57.1, p. 445	5
3 Scott, *Trusts* (2d Ed., 1956), § 331, p. 2414	5
Treasury Department General License No. 94, as amended on March 4, 1947 (12 F. R. 1457)	2, 4, 5, 6, 12
General Ruling No. 4, as amended May 24, 1941, 6 Fed. Reg., 2583	13
Vesting Order No. 17921 (16 Fed. Reg. 5462)	4